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International Covenant on Civil and Political Rights

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Human Rights Committee

Communication No. 2177/2012

Views adopted by the Committee at its 110th session (10–28 March 2014)

Submitted by:	Dexter Eddie Johnson (represented by The Death Penalty Project)
Alleged victim:	The author
State party:	Ghana
Date of communication:	18 July 2012 (initial submission)
Document references:	Special Rapporteur's rule 92 and 97 decision, transmitted to the State party on 19 July 2012 (not issued in document form)
Date of adoption of Views:	27 March 2014
Subject matter:	Mandatory death penalty
Substantive issues:	Right to life, prohibition of inhuman or degrading treatment or punishment, right to fair trial
Procedural issue:	None
Articles of the Covenant:	6, para. 1; 7; and 14, paras. 1 and 5
Article of the Optional Protocol:	2

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Annex

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights (110th session)

concerning

Communication No. 2177/2012*

Submitted by:	Dexter Eddie Johnson (represented by Death Penalty Project)
Alleged victim:	The author
State party:	Ghana
Date of communication:	18 July 2012 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 27 March 2014,

Having concluded its consideration of communication No. 2177/2012, submitted to the Human Rights Committee on behalf of Dexter Eddie Johnson under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views pursuant to article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication is Dexter Eddie Johnson, a national of Ghana and the United Kingdom born in 1967. He has been sentenced to the death penalty and claims that if Ghana[1] proceeded with the execution, it would violate his rights under articles 2, paragraph 3; 6, paragraph 1; 7; and 14, paragraphs 1 and 5, of the International Covenant on Civil and Political Rights. He is represented by The Death Penalty Project.

1.2 On 19 July 2012, pursuant to rule 92 of the Committee's rules of procedure, the Committee, acting through its Special Rapporteur on new communications and interim

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* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Mr. Gerald L. Neuman, Mr. Victor Manuel Rodríguez-Rescia, Mr. Fabian Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili, Ms. Margo Waterval and Mr. Andrei Paul Zlatescu.

In accordance with article 91 of the Committee's rules of procedure, Sir Nigel Rodley, member of the Committee, did not take part in the consideration of the communication.

[1] The Optional Protocol entered into force for Ghana on 7 December 2000.

measures, requested the State party to ensure that the death sentence against Dexter Eddie Johnson was not carried out while the communication was being examined by the Committee.

Facts as submitted by the author

2.1 On 27 May 2004 an American national was murdered near the village of Ningo in the Greater Accra Region in Ghana. The author was accused of committing the crime and brought to trial. He denied the offence. On 18 June 2008 the Fast Track High Court in Accra convicted the author of the murder and sentenced him to death, the only sentence available for the offence of murder under Ghanaian law.

2.2 The author submits that, according to Section 46 of the Criminal and Other Offences Act (1960), "a person who commits murder is liable to suffer death". He adds that whereas the term "liable" is ambiguous, it was construed in Ghanaian courts that the death penalty was mandatory in all cases of murder. He further claims that the right to life is enshrined in article 13, paragraph 1, of the Constitution of Ghana (1992), according to which "no person shall be deprived of his life intentionally except in the exercise of the execution of a sentence of a court in respect of a criminal offence under the laws of Ghana of which he has been convicted". The author further submits that the Criminal and Other Offences Act must be construed to give effect to the fundamental rights provisions in the Constitution, in particular the right to life. Although the Covenant is not incorporated in the domestic law of Ghana, it nonetheless provides persuasive guidance to the interpretation of the right to life provision under article 13, paragraph 1, of the Constitution.

2.3 The author appealed to the Court of Appeal and challenged the conviction and sentence. He claimed that whilst the death penalty per se is authorized under article 13, paragraph 1, of the Constitution, mandatory death sentence, on which the Constitution is silent, is unconstitutional. The author substantiated his claim by arguing that the mandatory death penalty violated the right not to be subjected to inhuman and degrading treatment or punishment; the right not to be subjected to arbitrary deprivation of life; and the right to a fair trial, all of which rights are protected under the Constitution. On 16 July 2009, the Court of Appeal dismissed the appeal both on the conviction and sentence. The Court of Appeal held, inter alia, that it had no jurisdiction to deliberate on the author's challenge to the constitutionality of the mandatory death penalty as this issue had not been raised before the lower Court and was not reflected in the record of proceedings. It further referred to article 13, paragraph 1, of the Constitution on the legality of the death penalty.

2.4 The author appealed to the Supreme Court against the conviction and sentence. On 16 March 2011, the Supreme Court dismissed the appeal against the conviction. With regard to the sentence, it rejected the Court of Appeal's decision on its own lack of jurisdiction to deliberate on the constitutionality of the mandatory death penalty, as matters of law could be raised at any time in the proceedings. Lastly, it rejected the merits of the author's challenge to the constitutionality of the mandatory death penalty, by holding that the mandatory death sentence for murder was consistent with the Constitution. It further added that only the parliament could amend the Criminal and Other Offences Act to incorporate the various degrees of murder and enable trial courts to determine the type of punishment to be imposed on a convicted murderer.

2.5 The author submits that he has exhausted domestic remedies, as there is no right to appeal against the decision of the Supreme Court.

The complaint

3.1 The author claims that a mandatory death penalty for all offences of a particular kind, such as murder, prevents the trial court from considering whether this exceptional

form of punishment is appropriate in the circumstances of the case. He thus claims that such an indiscriminate imposition of the death penalty amounts to a violation of his right to life under article 6, paragraph 1, of the Covenant.

3.2 The author submits that the imposition of a mandatory death sentence with no judicial discretion to impose a lesser sentence violates the prohibition of inhuman or degrading treatment or punishment under article 7 of the Covenant. In this respect, the author cites jurisprudence from national courts as well as the judgement of the European Court of Human Rights in *Soering* v. *United Kingdom*[2].

3.3 The author also submits that the mandatory imposition of the death penalty in his case violated his right to a fair trial, since part of that right is the right to review of his sentence by a superior court, and his sentence thus amounts to a violation of his rights under article 14, paragraphs 1 and 5, of the Covenant. He explains that such obligatory sentences prevent courts from determining the sentence for the individual concerned. Instead they impose a unique sentence regardless of the specific circumstances of the offence or of the offender. They also prevent any consideration of factual issues at the appeal stage, thereby violating the offender's right to have his sentence reviewed by a higher court.

3.4 Lastly, the author submits that the State party has failed in its obligation under article 2, paragraph 3, of the Covenant to provide an effective remedy to the aforementioned violations of his rights, and requests the Committee to make a finding to that effect.

The State party's observations on admissibility and merits

4.1 The State party submits that it is a de facto abolitionist State, since it has not carried out any death sentences in the past 20 years, and therefore it would be highly unlikely that the death penalty would be carried out in the present case. Furthermore, while reaffirming that the Constitution, which retains the death penalty, is the supreme law in Ghana, the State party submits that constitutional reform is under way in relation to the death penalty.

4.2 The State party submits that international instruments to which it is party, including the Covenant and its Optional Protocol, have not been given effect in its legal system, and thus do not take precedence over national law. It further notes that it has not ratified the Covenant's second Optional Protocol. It adds that the author's challenge to the constitutionality of the mandatory death penalty has been rejected by the highest judicial body in Ghana.

4.3 Whereas article 13, paragraph 1, of the Constitution allows the death penalty for certain serious crimes, which are murder, genocide and treason, such a penalty is not indiscriminately imposed, and the personal circumstances of a person convicted for murder may lead to a reduced sentence. The State party further submits that as a sovereign State, it can and does decide on how to balance competing rights enshrined in its Constitution.

4.4 It adds that in cases of murder, the jury trial assesses the circumstances of the particular case, and must come to a unanimous decision for a conviction to be issued regarding a murder charge. The State party adds that convicted persons may seek pardon from the President, who can commute the death penalty to a lesser sentence.

4.5 As long as the deprivation of life is not arbitrary, international human rights law does not object to the imposition of the death penalty, rather it tries to encourage States to

[2] *Case of Soering* v. *the United Kingdom* (Application no. 14038/88), judgment of 7 July 1989, para. 104.

abolish it, and to introduce certain limits as to how such a sentence is imposed. Moreover, the death penalty in Ghana is practised within international limits, as it is permitted only for the aforementioned three serious crimes; pardon can be sought; and some categories of offenders may not be subject to the death penalty. The death penalty is not carried out in the case of defendants who are juveniles, pregnant women or nursing mothers. Moreover, persons with mental disability or illness who would not understand the consequences of their acts, or persons in a "paroxysm of madness" who are incapable of knowing that murder is a crime, are not subject to punishment. Intoxication is also a defence if the individual was involuntarily intoxicated or intoxicated to the point of insanity. The State party thus concludes that the personal circumstances of defendants are taken into account when a death sentence is imposed.

4.6 The State party concludes that the death penalty for murder in Ghana takes account of varying degrees of seriousness, as courts are not prevented from considering the basic circumstances of defendants or from individualizing the sentence. Courts do not indiscriminately impose a mandatory death penalty. It thus invites the Committee to find that a mandatory death penalty is not imposed for all offences of a particular kind in Ghana, due to the various categories of persons for which the death penalty cannot be carried out.

4.7 With regard to the author's claim under article 7 of the Covenant, the State party submits that, as there are several categories of person against whom the death penalty cannot be carried out, criminal sentences are individualized to some extent and the imposition of the death penalty is not mandatory in all cases of murder. It adds that the sentence is proportionate to the gravity of the offence, as murder is normally punishable by sentence of death, but that mitigating factors allow the non-application of the death penalty for the crime of murder. Therefore, there is no violation of the prohibition of inhuman or degrading treatment or punishment under article 7 of the Covenant.

4.8 With regard to article 14, paragraphs 1 and 5, of the Covenant, the State party claims that a mandatory imposition of the death penalty for the offence of murder does not violate the author's rights under article 14, paragraphs 1 and 5, as the Supreme Court is empowered to conduct judicial review as well as to rule on the constitutionality of any legislation or executive action. It further endorses the Supreme Court conclusion that Section 46 of the Criminal and Other Offences Act is consistent with the Constitution and thus only the parliament has the power to change the law with regard to the sentence for murder.

4.9 The State party recapitulates by stating that: international law does not prohibit capital punishment; Ghana is not a party to the second Optional Protocol to the Covenant; it has not to date voted in favour of the United Nations moratorium on the death penalty; it asserts its sovereign right to balance competing rights; the death penalty is permitted in its legal system, and since the provision permitting that is consistent with the Constitution, it is the role of the parliament to change the law and not that of the judiciary; the application of the death penalty in Ghana is reserved only for the most serious crimes, in line with article 6, paragraph 2, of the Covenant, and is not automatically applied to defendants; legal safeguards are in place to prevent miscarriages of justice, in particular in connection with criminal charges for which the death penalty may be applied; the death penalty has not been executed in Ghana in the last two decades; and legal reform that, inter alia, aims at abolishing the death penalty in Ghana is under way.

4.10 The State party concludes that, until the Constitution reflects the ultimate shift in its law on the death penalty, the Committee is invited to recognize the supremacy of the Constitution, and not to make any adverse findings against it.

Author's comments on the State party's observations

5.1 The author agrees with the State party's assertions that: the Covenant has not been given effect in the Ghanaian legal system; Ghana is a sovereign State retaining its right to balance competing rights; legal safeguards to prevent miscarriages of justice are in place; and that there are current moves in Ghana to abolish the death penalty. However, the author claims that these assertions have no bearing on the merits of his communication before the Committee.

5.2 The State party erred in its assertion that the crime of murder is normally punishable by the death penalty, as in Ghana the crime of murder is necessarily punishable by the death penalty and courts have no discretion or power to impose a different sentence. In his case, the trial judge pronounced the death sentence immediately after his conviction as the only available sentence for the crime of murder. The death penalty was mandatory, and there was no room for any judicial discretion not to impose the death penalty against him once he had been convicted of murder.

5.3 The author reiterates that there were no mitigating circumstances that the court could have applied in order to change the death sentence. He further quotes the trial judge as stating immediately after his conviction; "the only sentence for the crime you committed is death. You are therefore sentenced accordingly".

5.4 Regarding the State party's claim as to the existence of the clemency provision in its Criminal and Other Offences Act, he submits that this argument has no bearing on his complaint, since such discretionary measures cannot replace judicial review of a criminal case.

5.5 As regards the State party's arguments under article 14 of the Covenant, he comments that, since the Supreme Court has rejected his challenge to the constitutionality of the mandatory death penalty for murder, no court in Ghana has the power to review the sentence in cases where the defendant is convicted of murder.

5.6 Lastly, the author comments on the State party's assertion that it is a de facto abolitionist State. He states that this is a matter of political discretion, and that executions can resume at any time. The Committee is thus invited to afford the author a measure that would stop his execution.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the case is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement. It also notes that domestic remedies have been exhausted. No challenge from the State party to this conclusion has been received. The requirements of article 5, paragraph 2 (a) and (b), of the Optional Protocol have thus been met.

6.3 The Committee considers that the author's claims under articles 2, paragraph 3; 6, paragraph 1; 7; and 14, paragraphs 1 and 5, have been sufficiently substantiated for the purposes of admissibility. Accordingly, the Committee declares the communication admissible and proceeds to its examination on the merits.

Consideration of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all information made available to it, in accordance with article 5, paragraph 1, of the Optional Protocol.

7.2 The Committee notes the author's claims under article 6, paragraph 1, of the Covenant, that Section 46 of the Criminal and Other Offences Act prescribes the death penalty for the offence of murder as the only penalty, and that the State party's Constitution is silent as to whether the death penalty must be imposed in relation to the offence of murder. The Committee also notes the State party's claims that convicted persons may seek pardon from the President; that Ghana is a de facto abolitionist State; and that some categories of offender are not subject to the death penalty, including pregnant women, nursing mothers, minors and persons with mental disability or illness. While recognizing that the State party is de facto abolitionist, the Committee notes the author's response that the de facto moratorium does not guarantee that a death sentence will not be carried out at a later point. In this connection it recalls the State party's statement that it has thus far not voted in favour of General Assembly resolution 62/149, which calls for a worldwide moratorium on executions.

7.3 The Committee notes that in the case of the author, there was no room for judicial discretion at the first instance or appeal courts so as not to impose the only sentence provided by law, that is, the death penalty, after he had been convicted for murder. The Committee further notes that, while the State party's legislation excludes the imposition of the death penalty for certain categories of persons, the mandatory imposition of the death penalty for any other offender is based solely upon the category of crime for which the offender is found guilty, with no margin for the judge to evaluate the circumstances of the particular offence. In this context, the Committee refers to its jurisprudence to the effect that the automatic and mandatory imposition of the death penalty constitutes an arbitrary deprivation of life, in violation of article 6, paragraph 1, of the Covenant, in circumstances where the death penalty is imposed without regard to the defendant's personal circumstances or the circumstances of the particular offence.[3] The existence of a de facto moratorium on the death penalty is not sufficient to make a mandatory death sentence consistent with the Covenant.[4] Furthermore, the Committee recalls that the existence of a right to seek pardon or commutation, as required under article 6, paragraph 4, of the Covenant, does not secure adequate protection to the right to life, as these discretionary measures by the executive are subject to a wide range of other considerations compared to appropriate judicial review of all aspects of a criminal case.[5] It follows that the automatic imposition of the death penalty in the author's case, by virtue of Section 46 of the Criminal and Other Offences Act, violated the author's rights under article 6, paragraph 1, of the

[3] Inter alia, communications No. 1520/2006, *Mwamba* v. *Zambia*, Views adopted on 10 March 2010, para. 6.3; No. 1132/2002, *Chisanga* v. *Zambia*, Views adopted on 18 October 2005, para. 7.4; No. 845/1998, *Kennedy* v. *Trinidad and Tobago*, Views adopted on 26 March 2002, para. 7.3; and No. 806/1998, *Thompson* v. *St. Vincent & The Grenadines*, Views adopted on 18 October 2000, para. 8.2.

[4] Communication No. 1406/2005, *Weerawansa* v. *Sri Lanka*, Views adopted on 17 March 2009, para. 7.2.

[5] Communication No. 806/1998, *Thompson* v. *St. Vincent & the Grenadines*, Views adopted on 18 October 2000, para. 8.2.

Covenant. The Committee also reminds the State party that by becoming a party to the Covenant it undertook to adopt legislative measures in order to fulfil its legal obligations.[6]

7.4 In the light of the above finding of a violation of article 6, paragraph 1, of the Covenant, the Committee will not address the author's remaining claims under articles 7 and 14, paragraphs 1 and 5.[7]

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal a violation of the author's right under article 6, paragraph 1, of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including the commutation of the author's death sentence. The State party is under an obligation to avoid similar violations in the future, including by adjusting its legislation to the provisions of the Covenant.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and to have them widely disseminated in the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

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[6] Article 2, paragraph 2, of the Covenant, and general comment No. 31 (2004) on the nature of the general legal obligation on States Parties to the Covenant, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40*, vol. I (A/59/40 (Vol. I)), annex III, paras. 7 and 13.

[7] Communication No. 1077/2002, *Carpo et al.* v. *the Philippines*, Views adopted on 28 March 2003, para. 8.4.